JD–46–04
Flint, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SUPERIOR TRAVEL SERVICE, INC.

and Case 7–CA–46641

SUSAN M. WHITE

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for the General Counsel.
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Grand Blanc, Michigan,
for the Respondent.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Flint, Michigan, on February 19, 2004. Susan M. White (White or the Charging Party) filed the underlying charge on September 18, 2003. The Director of Region 7 of the National Labor Relations Board issued the complaint on November 24, 2003, alleging that Superior Travel Service, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employees and then terminating White because employees engaged in protected concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

I. Jurisdiction

A. Facts

The Respondent is a travel agency that assists its customers in reserving and purchasing airline tickets, passenger rail tickets, cruises, hotel accommodations, tours and other travel-related products. It has offices and places of business within Michigan, in the cities of Davison, Fenton, Flint, and Grand Blanc. At the time of the alleged violations, the Respondent had at least five travel agents (two of whom were part-time) and a supervisory and managerial staff of six or more. Ursula Schmitt (U. Schmitt) is the Respondent's president, Ingrid Schmitt (I. Schmitt) its general manger, and John Schmitt (J. Schmitt) its director of sales and marketing. Diane Payne is the office supervisor of the Respondent's Flint, Michigan, location, where White was assigned during her tenure with the company. In addition to her supervisory duties, Payne functions as a travel agent for the Respondent.

The Respondent's travel business generates revenue in the form of commissions. During the 12 months preceding trial, the Respondent received commissions in excess of $50,000 for facilitating the sale of travel products by travel entities located outside the State of Michigan to in-state customers. The record also shows that one of the Respondent's travel agents, earning $10 per hour, must generate approximately $4000 a month in commissions, or about $48,000 a year in order to justify their hourly pay. Given that the Respondent had at least five travel agents during White's tenure, and would be expected to have a minimum of one individual performing travel agent duties in each of its four or more offices, it is clear that the Respondent's travel business generates well in excess of $100,000 in revenues. Most of those revenues are generated by facilitating travel that is interstate in nature.[1] Based on this I conclude that it is reasonable to infer that the Respondent derives over $50,000 in revenues from facilitating travel that is interstate in character.

B. Analysis

The General Counsel alleges that jurisdiction exists under the standard applicable to businesses that are "essential links" in interstate transportation. Under that standard, the Board asserts jurisdiction over "all transportation and other enterprises which function as essential links in the transportation of passengers or commodities in interstate commerce, which derive at least $50,000 gross revenues per annum from such operations, or which perform services valued at $50,000 or more per annum for enterprises as to which the Board would assert jurisdiction under any of its jurisdictional standards." *HPO Service, Inc.*, 122 NLRB 394 (1958). The General Counsel also contends that the Board has jurisdiction because the Respondent receives commissions in excess of $50,000 per year from carriers and other travel entities located outside the State of Michigan. The Respondent counters that its business is essentially local in character – between itself and its customers in the State of Michigan – and therefore does not affect commerce within the meaning of the Act as required for the Board to assert jurisdiction.

I conclude that the Board has jurisdiction over this matter under the "essential links" standard. The Respondent admits it is a travel agency that books airline flights, passenger rail trips, tours, cruises, and other travel products, but denies that such activities are an essential link in interstate travel. The Respondent attempts to hoe a hard row when it contends that the business of travel agencies is not sufficiently involved with interstate travel to constitute an essential link.[2] The untenability of the Respondent's argument is confirmed by decisions of the

[1] It is reasonable to infer that most of the travel is interstate in character based on the modes of transportation that the Respondent books (including air travel, cruises, tours), the specific travel requested by some of it customers, and the record as a whole. The Board has approved such reasonable inferences in this context in the past. For example, in A*irlines Parking, Inc.* the Board affirmed a trial examiner's decision, which inferred that people who left their cars at an airport parking facility would then engage in air travel of an interstate character, even though there was no direct evidence of that. 196 NLRB 1018, 1020 (1972), enfd. 470 F.2d 994 (6th Cir. 1972). The Act defines interstate commerce to include not only transportation between the states, but also international transportation. Section 2(6). The Respondent has not claimed that the bulk of the travel it facilitates is intrastate.

[2] The question at this point in the inquiry is whether the type of service the Respondent provides is an essential link, not whether the volume of the Respondent's individual travel business is substantial enough to make it, on its own, an essential link. The issue of whether the volume of the Respondent's "essential link" business is substantial enough to trigger

Continued

Board, which have consistently approved application of the essential links standard to employers who, like the Respondent, are in the business of facilitating interstate travel, even when they do not directly provide it. In *Jarvis Cafeteria of Portsmouth*, 200 NLRB 1141 (1972), the Board found that the business of a travel bureau that received commissions from a bus company for selling tickets and handling freight at a cafeteria used as a bus stop was an essential link in interstate travel.[3] In a similar case, *Greyhound Terminal*, 137 NLRB 87, n.2 (1962), enfd. sub nom. *NLRB v. Shurett*, 314 F.2d 434 (5th Cir. 1963), an employer who received commissions for selling tickets, furnishing information, and maintaining waiting room, toilet and baggage facilities for bus passengers was found to be an essential link in interstate travel. In three other cases, an employer who maintained airport parking facilities, one who provided airport limousine service, and one who transported crews between piers and oceangoing vessels were all found to be engaged in businesses that were essential links in interstate travel, even though none of those employers were shown to actually transport the passengers interstate. See *Big Apple Launch*, 306 NLRB 735, 736 (1992) (piers); A*irlines Parking, Inc.*, 196 NLRB 1018 (1972), enfd. 470 F.2d 994 (6th Cir. 1972) (airport parking); *Horace F. Wood Auto Livery Co.*, 93 NLRB 997 (1951) (airport limousine). The Respondent has not cited a single case in which the essential link standard was found inapplicable to an employer that facilitated interstate travel, much less any case where the standard was found to be inapplicable to an employer that's very reason for being was, like the Respondent's, to earn commissions by facilitating and arranging such travel.

Since the "essential link" standard applies to the Respondent's interstate travel business, the Board will assert jurisdiction if the Respondent derives more than $50,000 in annual revenues from that business. As discussed above, the record in this case warrants an inference that the Respondent generates over $50,000 in commissions from facilitating travel that is interstate in nature.[4] Therefore, I find that jurisdiction has been established.

As noted above, the General Counsel also asserts jurisdiction on the basis that the Respondent received more than $50,000 in commissions from entities located outside the State of Michigan. The record shows that the Respondent derived more than $50,000 in commissions from facilitating transactions between in-state customers and travel entities outside the State of Michigan. I suspect that the commissions received by the Respondent for arranging bookings with out-of-State travel entities were paid by those entities, rather than by the in-state customers, but there is some question about whether the record establishes that this is the case. Moreover, the stipulation on which the General Counsel relies for this assertion of jurisdiction states only that the Respondent has received more that $50,000 in such commissions, not that it has done so during a 1-year period. Given my finding that jurisdiction is established under the standard for businesses that are essential links in interstate travel, I need not reach the question of whether the Respondent received commissions or other revenues in excess of $50,000 per year from entities located outside the State of Michigan.

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jurisdiction is a separate question which the Board answers by determining whether that business generates at least $50,000 in gross revenues per year. Thus the Board found in one case that an employer's business was an essential link in interstate transportation, but that the volume of that business was less than $50,000 per year and did not warrant the assertion of jurisdiction. See *Jarvis Cafeteria of Portsmouth*, 200 NLRB 1141 (1972).

[3] The gross revenues were evaluated under the essential link standard, but were less than $50,000 and, therefore, the Board did not assert jurisdiction. See supra fn.2.

[4] The Respondent has not argued that it generates less than $50,000 in commissions from the sale of travel products for interstate travel.

II. Alleged Discriminatory Discharge and Threat

A. Facts

White began working for the Respondent as a part-time travel agent in the company's Flint, Michigan, office on August 11, 2003, and was terminated less than a month later on September 8, 2003. Before coming to the Respondent, White had worked as travel agent for over 5 years. She was told about the opening with the Respondent by one its travel agents, Brenda Amy, with whom White had become acquainted at another travel agency. Prior to being hired, White completed an application and was interviewed by Payne. The application asked White to rate her experience and training as a travel agent. On a scale of one to ten, with ten being the highest experience level, White gave herself scores of between two and ten in the various areas. Among her self-ratings were: "ten" for her comfort level using the pricing codes in a computer language known as "Sabre," which is used for travel booking; "five" for her comfort level "selling and modifying Amtrak reservations in Sabre"; and, "four" on her knowledge of "international travel reservations." White stated on her resume that she had over 100 private clients. During her interview with Payne, White explained that she wanted to limit herself to part-time work so that she could have the flexibility to accompany her husband when he traveled. Payne responded that this would not be a problem since White would only be working 2 days a week and every other Saturday. During the interview, White asked if she would be permitted to take time off at the beginning of September to attend a seminar to become a certified cruise counselor. Payne denied the request, stating that it would be too soon after White started work. White also asked about taking "a couple of days" off later in September in order to travel to Reno, Nevada, with her husband. Payne responded that she would "see about that." Payne hired White and scheduled her to work Monday, Tuesday, and every other Saturday. Another part-time travel agent at the Flint office, Peggy Dewley, had been hired a few weeks earlier, and was scheduled to work on Thursday and Friday, and to alternate Saturdays with White. Payne told both White and Dewley that when they wanted days off, they could arrange to have the other one cover the days.

When White began work, she was sent for two days to the Respondent's office in Fenton to be trained by the Fenton office supervisor – Melody Brewer. The most significant area in which White required training was the Respondent's internal accounting procedure. That procedure was complex and full-time employees usually required 4 to 6 weeks to master it. On the first day of White's training there were no sales that Brewer could use to demonstrate the accounting procedure. On the second day of training, Brewer was able to demonstrate the accounting procedure, and also showed White how to operate office equipment such as the facsimile machine and the copy machine. Brewer also showed White how to open the safe in the Fenton office, but stated that it was different than the safe in the Flint office.

The following week, on August 18, White began performing her job duties at the Flint office. On White's first day at the Flint office, Payne informed her that the Respondent would withhold her first paycheck until she left or was fired. Payne also directed White to prepare a "prospect list" of her private clients so that those clients could be contacted and encouraged to book future travel through the Respondent. Later that week, Payne gave White, Amy, and Dewley copies of the Respondent's employee handbook. Payne was going on vacation the next week, but before leaving she asked the three employees to review the handbook and sign it during her absence. Before Payne left, White asked again whether she could have two days off later in September in order to go to Reno with her husband. Payne stated that White could

take those days as long as Dewley agreed to substitute for her.[5] White asked Dewley to substitute, and Dewley agreed to do so.[6] White also told Payne that she would like to take time off near the Christmas holiday in order to visit her husband's family. Payne denied that request, and White did not pursue the matter further.

White was troubled by a number of the Respondent's policies. She believed that the practice of withholding employees' first paychecks was unlawful. In addition, she believed that the handbook improperly treated the employees as commissioned agents when they had been hired as hourly employees. She was also concerned about a handbook provision that she believed permitted the Respondent to change employees' working conditions at any time. During the week that Payne was on vacation, White drafted, and signed, a petition complaining about these matters. She circulated the petition to Amy and Dewley, and they signed it as well. White had prepared the prospect list, but decided that she would not provide it to the Respondent until the concerns set forth in the petition were addressed.

On Tuesday, September 2, Payne returned from vacation and called White to her office to ask for the prospect list. White told Payne that she would not provide the information at that time because she had a problem with the handbook. Then, White and Amy gave Payne the petition, which read:

> August 25, 2003
> Superior Travel Service, Inc.
> Attn: Diane [Payne]
> We find that we are unable to sign the STS employee handbook, at this time, because we do not understand nor can comply with all the provisions as contained within the handbook. There are many policy issues that are of concern. The following major areas require immediate attention:
> - The unwritten policy and legality of withholding an employee's first check.
> - Hired as hourly waged employee(s), but also treated as contracted commissioned agent(s), at the same time.
> - If the handbook is "neither a contract of employment nor a legal document" and it can be changed at any time, employee rights are not protected.
>
> We request a meeting with STS, Inc. to deal with our concerns in a timely fashion. We also request that our first employee checks be released to us immediately. Further, we request a signature of acknowledgement and receipt of our listed concerns, by the Executive Officer(s) of the Superior Travel Service, Inc.
> Sincerely,
> [signed]
> Susan White
> [signed]
> Peggy Dewley

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[5] According to the Respondent's employee handbook, paid vacation time is available only to full-time employees who have worked for the Respondent for at least 1 year. White and Dewley were part-time employees who had not worked for the Respondent for over a year and thus were not entitled to paid vacation time. However, Payne told White and Dewley that if they wanted to take days off they could arrange for the other one to cover the days. White's requests were for unpaid leave, not paid vacation.

[6] White's testimony that Dewley agreed to substitute for her, and that Payne approved the leave, is corroborated by the testimony of Amy, a witness who was not shown to have anything to gain or lose in this proceeding and one whom I found very credible.

[signed]
Brenda Amy
Please sign, acknowledging receipt of this letter and concerns.
X_____ Date _____
_____
Position within STS, Inc.

Payne was not pleased to receive the petition. She told White and Amy: "I don't appreciate you giving me this on my first day back. I cannot believe . . . that you went ahead and did this." She told White and Amy that she was going to have to talk to J. Schmitt about it. Two days later, on September 4, the Respondent met with the three employees who had signed the petition. At the start of the meeting, J. Schmitt and Payne were present for the Respondent, and about twenty minutes later, I. Schmitt joined them. J. Schmitt began the meeting by stating that the petition was "the wrong way to go about this." He said: "We are a friendly company. All you have to do is call us and we'll take care of this. I don't like seeing this kind of thing . . . nothing has to be written down here." White responded: "I guess we went about it the way we thought that we needed to do." J. Schmitt asked, "[W]ho wrote this [petition], who started this?" White answered that she had. J. Schmitt reiterated that the petition was the "wrong way" to go about bringing the concerns to the Respondent's attention and said that White should have called him. J. Schmitt went on to discuss the employees' hourly/commission status, and apparently explained that matter to White's satisfaction.

J. Schmitt waited until I. Schmitt arrived to address the issue regarding employees' first paychecks. Once I. Schmitt arrived, White handed her some information, printed from a website, which White believed showed that the Respondent's practice of withholding employees' first checks was unlawful. I. Schmitt threw this printed information on the floor and stated that it did not apply to the Respondent. White also complained that her paycheck did not accurately state the dates that she worked. J. Schmitt asked I. Schmitt to investigate this, but I. Schmitt refused. By the end of the meeting, Dewley signed the employee handbook, but White and Amy declined to do so. J. Schmitt asked White if she intended to pursue her complaints and White stated that she did. J. Schmitt then warned her: "[D]o you realize what an at-will employee means. . . . you can be fired at any time for any reason."[7]

The following Monday, September 8, was Payne's first day back in the Flint office. That morning, Payne gave White a key to the Flint office and also informed her that there would be a sales meeting at U. Schmitt's home on Wednesday evening. Payne told White that she would not be paid for attending that meeting, but that the other employees would be paid because they were scheduled to work on Wednesday. Later that day, Payne called White into her office and asked, "[W]hat do you mean you're going to Reno?" White reminded Payne that she had approved the days off, as long as Dewley was willing to substitute for her. White stated that Dewley had agreed to cover for her and also informed Payne that she had purchased non-refundable airline tickets for the trip. Payne asked for the dates that White would be in Reno,

[7] I credit White's account of these statements by J. Schmitt, which was clear and certain. J. Schmitt's denial, to the extent that it could be called that, was unconvincing to me. When the Respondent's counsel initially asked J. Schmitt whether he had made any statement to White regarding her status as an at-will employee, he replied, "No." Tr. 160. But when the Respondent's counsel followed up by asking whether he had told White "that she was an at-will employee and could be fired for any reason," he retreated a bit, replying "Not to my recollection." Id. When counsel for the General Counsel asked, "Is it possible you said that?" J. Schmitt responded, "It's possible." Tr. 162.

and when White told her, Payne said: "Well, you can't go for that long. I thought you were only going to be gone for a week." White explained that while she was planning to be out-of-town for over a week, she was only missing 2 days of work, given her part-time schedule and the timing of the trip. She asked why she could not take the trip if Dewley was prepared to work those two days, and Payne responded, "I'll have to let you know." White responded: "I'm not going to cancel. You told me I could go . . . if I had Peggy [Dewley] cover." Later that day, Payne called White into her office and said, "[T]his Reno trip is a real problem." Payne stated that she and White were "definitely not on the same page." Then she told White: "I think it's best if you're done today. . . . Things just aren't working out. You're asking for too much stuff and you're protesting everything that we say and do." White asked if the petition had something to do with her discharge, and Payne responded: "Well, that does have something to do with it. We knew at the meeting that you would not work out."[8] Payne asked for White's key to office, and after White gave it to her, Payne said White could leave. Payne was the official who made the decision to discharge White, although she discussed the matter with either I. Schmitt or U. Schmitt prior to communicating the decision to White.[9] During her time as an employee of the Respondent, White had worked on at least 3 days in addition to the days she was scheduled to work. Two of those days she worked at the Fenton office, and on one Friday she came to the Flint office. There is no evidence that she was ever absent on one of her scheduled workdays.

[8] Payne denies that she told White that the petition played a part in the discharge and testified that the petition did not upset her. I find Payne's testimony completely lacking in credibility. It is contrary not only to White's credible testimony regarding the conversation, but is also inconsistent with Payne's own prior statement to the Board. In a letter, Payne stated: "I did have a problem with the way [White] went about [the petition]. I felt like she connived behind my back especially getting the other employees involved and upsetting what was a harmonious work place." After being confronted with this prior statement at trial, White admitted that she "felt like [White] had connived and schemed behind – or while I was on vacation." Tr. 137-38. Payne's use of language like – "schemed," "connived," "behind my back" – to describe White's lawful concerted activity leave little doubt of her anger about, and hostility, towards those actions. Payne's credibility was also undermined by her tendency to overstate White's supposed shortcomings. For example, in stating her reasons for discharging White, she noted that there were "some leads or callbacks that did not get returned." Tr. 123. However, the record shows that there were not "*some*" calls that did not get returned, but only one, and that the responsibility for returning that call had been assumed by another employee under regular office procedures. At another point in her testimony, Payne tried to give the impression that White was seeking time off simply to go to Florida with her husband, but when pressed she admitted that White had asked to attend a seminar to become certified as a cruse counselor, and that this certification would have added to White's usefulness as a travel agent. Tr.118. Payne testified that she terminated White, in part, because Amy had complained that White "did not know how to do anything." However, Payne admitted that she only heard about Amy's supposed complaints second hand, and that she did not even ask Amy about them prior to discharging White. Tr. 142. Amy, a very credible witness with no apparent bias or interest in the outcome of this litigation, testified that she had never complained about White's performance. Tr. 95. In reaching the conclusion that Payne should not be credited, I also took into account Payne's demeanor. She was frequently defensive, and when discussing the protected activity her antagonism was palpable.

[9] Payne testified that she spoke to "Ms. Schmitt" about White shortly before telling White that she was discharged. The record does not reveal whether the individual she spoke to was I. Schmitt or U. Schmitt.

The Respondent now raises a number of alleged inadequacies in White's performance, none of which were discussed with White at the time she was discharged, or resulted in any type of discipline prior to when White submitted the petition. Two of these issues relate to White's performance on a particularly busy day during the week of Payne's vacation. In one instance, White was at her desk helping a customer who was in the office, when the phone rang. White answered the phone and spoke briefly to the caller, who wished to arrange a trip to Egypt. Since White had a customer at her desk, and other customers waiting in the office to be seen, White told the caller that someone would return the call. Amy, who was also present in the office, told White that she would return the call about the Egypt trip since the office was very busy, White was new, and arranging the Egypt trip would require research. Amy did not return the call herself, but turned the matter over to Melody Brewer of the Fenton office. Since business at the Fenton office tended to be slow, employees at the Flint office sometimes passed work to the Fenton office if they were too busy to do it themselves.

That same day, White assisted a customer who wanted to arrange travel that included airline flights, multiple hotel stays, and Amtrak trips. White completed the purchase of the Respondent's airline tickets, reserved the hotel rooms with a guaranteed rate, and reserved the Amtrak service. White could not print the Amtrak tickets at the office, an action that required familiarity not only with Sabre, but also with Amtrak's system. As a result, White did not complete the purchase of the Amtrak tickets; however she arranged for Amtrak to hold the reservation at a fixed price for one week. Her intention was to ask Payne to assist her with printing the Amtrak tickets the following week when Payne returned from her vacation. Subsequently, Amy called White at home and told her that I. Schmitt wanted her to come to the office on Friday – prior to Payne's return -- so that White could complete the Amtrak transaction. Amy told White to call an employee in the Respondent's Grand Blanc, Michigan, office to assist her in printing the tickets. White came to work that day and, with the assistance of the employee in Grand Blanc, completed the Amtrak purchase, although there was a problem with the Flint computer system and the tickets actually had to be printed at the Grand Blanc office.

B. Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act on about September 8, 2003, when Payne discharged White because of her protected concerted activities, and, on about September 4, 2003, when J. Schmitt threatened employees with termination for pursuing wage and payroll complaints,

C. Analysis

1. Discharge

In order to establish that the Respondent violated Section 8(a)(1) by discharging White, the General Counsel must show that she "had engaged in activity which was both concerted and protected and that such activity was the cause, in whole or in part, of the discharge[ ]." *Liberty Natural Products, Inc.*, 314 NLRB 630, 637 (1994), enfd. 75 F.3d 369 (9th Cir. 1995) (Table), cert. denied, 518 U.S. 1007 (1996); see also *Kathleen's Bakeshop, LLC*, 337 NLRB 1081, 1088-89 (2002), enfd. 2003 WL 22221353 (2d Cir. 2003); *C.D.S. Lines, Inc.*, 313 NLRB 296, 300 (1993), enfd. 39 F.3d 1168 (3rd Cir. 1994) (Table); *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded by 755 F.2d 941 (D.C Cir. 1985), cert denied 474 U.S. 971 (1985), decision on remand 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988). The General Counsel easily establishes the elements of a violation. White engaged in concerted activity by preparing, circulating, signing, and, with Amy, presenting a petition regarding employees' terms and conditions of employment. The Board has held that

these types of group approaches to an employer are concerted and protected by the Act. See, e.g., *Liberty Natural*, 314 NLRB at 630; *Kysor Industrial Corp.*, 309 NLRB 237 (1992); *Meyers Industries*, 268 NLRB at 497. There is no dispute that several of the Respondent's officials, including Payne, were aware of the petition, and knew that it represented the group action of three of its employees. The requirement that the General Counsel show that the adverse decision was motivated by the protected activity is satisfied in this instance by credible direct evidence of unlawful motive. Payne, who made adverse decision, told White at the time of her discharge that the petition had played a part in the decision, and that the Respondent knew at the meeting about the petition that White would not "work out" as an employee. Additional evidence of unlawful motivation is provided by Payne's testimony, that she had a "problem" with White's lawful concerted activity, which Payne viewed as White "conniving" and "scheming" "behind her back." The timing of White's discharge also supports the conclusion that the petition motivated Payne's decision. See *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994). Payne discharged White only 6 days after White presented the petition, 4 days after White had stated her intention to pursue the matter, and at a time when White had not received any prior discipline at all. Indeed White was terminated on the first day that she returned to the work at the Flint office after the meeting with J. Schmitt, I. Schmitt, and Payne regarding the petition.

The Respondent suggests that White's concerted activity was not protected because she did not follow the specific complaint procedures set forth in the employee handbook. The Respondent has not shown that White's actions were inconsistent with the handbook,[10] but, at any rate, employees are not required to limit themselves to those means of protest specifically approved by their employer. Indeed, handbook provisions violate the Act if they prohibit employees' from engaging in forms of activity that are protected by the Act. See, e.g., *Koronis Parts*, 324 NLRB 675, 686 and 694 (1997). An employee's protected concerted activity does not lose the protection of the Act unless he or she engages in misconduct that is so violent, outrageous or disruptive as to render the employee unfit for further service. *Wolkerstorfer Co.*, 305 NLRB 592 fn.2 (1991); *Hawthorne Mazda*, 251 NLRB 313, 316 (1980), enfd. 659 F.2d 1089 (9th Cir. 1981) (Table). In this case, White simply circulated a written petition, presented that petition to her supervisor, and then discussed her concerns with management during a meeting called by the Respondent. White did not engage in any inappropriate behavior at all, much less any behavior that was so violent, outrageous or disruptive that it removed her concerted activity from the protection of the Act.

Once the General Counsel shows, as it has here, that the employer's decision to discharge an employee was motivated by unlawful discrimination, the Respondent can avoid liability by showing that it would have discharged the employee even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983); *Vico Products Co.*, 336 NLRB 587 fn.15 (2001), enfd. 333 F.3d 198 (D.C. Cir. 2003). The Respondent raises five criticisms of White, which it claims show that she fell short as an employee. It contends that it discharged her for those reasons, not because of her protected concerted activity. The first shortcoming that the Respondent raises is that White

[10] The handbook states that complaints should first be raised with the employees' supervisor, and, in this case, White addressed, and presented, the petition to Payne, her supervisor. Moreover, it is clear that the Respondent did not require employees to strictly adhere to the complaint procedure in the handbook, since J. Schmitt, who was not White's supervisor, told White that the proper way for her to make a complaint was to call him.

"continuously asked for time off." Respondent's Brief at 3. To say that the Respondent is trying to make a mountain out of a molehill would be to understate the stature of a molehill. White made a total of three requests for time-off, all of which were for unpaid leave. Two of the requests were made during White's interview for the job, thus the Respondent knew of the requests before it even hired her. White's first request was for permission to attend a seminar to gain certification as a certified cruise counselor –- a certification that would have made her a more valuable travel agent. White's second request was to take a total of 2 days off for a trip to Reno, Nevada, in late September. Payne approved that request, and only withdrew her approval *after* Payne presented the petition. White's third request was made in late August and sought days off around the Christmas holiday. This request was made 4 months in advance, and Payne denied it. In both cases where Payne denied White's requests, White did not take issue with Payne's decision or raise the matter again. White only made an issue of Payne's unexplained decision to rescind approval of the Reno trip for which White told Payne she had already purchased non-refundable airline tickets. The Respondent indicates that White's time off requests were of concern because the company needed to adequately train her before the busy season began. However, during the short time that the Respondent employed her, White worked on at least 3 extra/unscheduled days and was not shown to have missed a single scheduled day's work. The Respondent's claim that it discharged White because her requests for time off were interfering significantly with her training is without merit. Based on this evidence, I conclude that the Respondent would not have disciplined, much less discharged, White because of her requests for time off, if not for the fact that she had engaged in protected activity.

The Respondent's second criticism is that White did not comply with Payne's request that she provide the company with contact information for her private clients. White had prepared the requested "prospect list," but told the Respondent that she would not supply it until management addressed her concerns about company policies that she believed were unlawful or improper. I can understand why White would be disinclined to provide this information before her concerns were addressed, especially if those concerns were serious enough that they might lead to an early end to the employment relationship. I can also understand why the Respondent would want contact information for White's customers, but the record does not show that the Respondent ever informed White that it viewed her refusal to immediately provide the prospect list as insubordination or worthy of discipline. At any rate, White did not indicate that she would never turn over the information, but only that she wanted the Respondent to address certain employee concerns before she did so. Under these circumstances, the Respondent has failed to show that, absent the protected activity, it would have terminated White because she did not provide the prospect list.

The third supposed shortcoming raised by the Respondent is that "despite [White's] representing to Superior that she was familiar and fairly comfortable making Amtrak reservations," when called upon to do this on one occasion she "booked the reservation" and "ran the customer's credit card to hold the . . . tickets," but "was unable to print the ticket." In actuality, when she applied, White had given herself a modest rating – five out of ten – for familiarity with "selling and modifying Amtrak reservations in Sabre." Nevertheless, on the occasion in question, White succeeded in completing the reservation, guaranteeing the fare, and holding the tickets with a credit card. Moreover, even the more experienced employee to whom White was referred for assistance was unable to get the Flint office system to print the ticket. This suggests that White's difficulty printing the tickets may have resulted, at least in part, from a deficiency or problem with the equipment available to White in Flint.

The fourth issue raised by the Respondent, is that Amy stated that White "was unable to process the sale of an airline ticket" and had "problems dealing with the finalizing of reservations

and with general office procedures." However, Amy testified that she never complained to the Respondent about White's performance. Indeed, Payne conceded that before she made the decision to terminate White, she did not even talk to Amy about White's performance. Payne's failure to perform a meaningful investigation into Amy's supposed complaints before using those complaints as a basis for terminating White is itself an indicia of discriminatory intent. *New Orleans Cold Storage & Warehouse Co.,* 326 NLRB 1471, 1477 (1998), enfd. 201 F.3d 592 (5th Cir. 2000). In fact, Amy's view was that White was capable in booking reservations. Amy thought White required additional training or experience in using the Respondent's internal accounting and office procedures, but this is not surprising given that those procedures generally took the Respondent's full-time travel agents 4 to 6 weeks to learn and White had worked for only about 3 weeks on a part-time basis. Indeed, Amy opined that of the four travel agencies where she had personally worked, the Respondent's accounting and office system was "the hardest one to figure out."

Lastly, the Respondent complains that White answered a call from a customer attempting to book a trip to Egypt, but never called the customer back to book the trip. As discussed above this criticism is completely unfounded. The Respondent does not even claim that it had a policy or practice of requiring the travel agent who answers the phone when a customer calls with a particular request to personally return that call. In the case of the customer interested in traveling to Egypt, the uncontradicted testimony was that White was busy with in-office customers when she received the phone call and that Amy assumed responsibility for returning the call. Amy then referred the matter to the Respondent's Fenton office, something she had done in the past when the Flint office was too busy to respond to a call promptly. Given these undisputed facts, it is inconceivable that the Respondent would have punished White for not returning the phone call, absent her involvement in the petition. [11]

For the reasons discussed above, I find that the General Counsel has shown that the Respondent's decision to discharge White was motivated by White's protected concerted activity, and that the Respondent has failed to show that it would have discharged White even absent her protected concerted activity. Therefore, I conclude that the Respondent violated Section 8(a)(1) of the Act by discharging White.

2. Threat

The Complaint also alleges that the Respondent violated Section 8(a)(1) of the Act when J. Schmitt impliedly threatened employees with termination for engaging in protected activity. An employer violates Section 8(a)(1) of the Act by threatening an employee with discharge for engaging in protected activity. *Bestway Trucking, Inc.*, 310 NLRB 651, 671 (1993), enfd. 22 F.3d 177 (7th Cir. 1994); *Potential School for Exceptional Children*, 282 NLRB 1087, 1090 (1987), enfd. 883 F.2d 560 (7th Cir. 1989); *Steinerfilm, Inc.*, 255 NLRB 769, 769-70 (1981), enfd. in relevant part 669 F.2d 845 (1st Cir. 1982). The evidence in this case shows that during the September 4 meeting regarding the employees' petition, J. Schmitt asked White if she intended to pursue her complaints and White responded that she did. J. Schmitt then said: "[D]o you realize what an at-will employee means. . . . you can be fired at any time for any reason." J. Schmitt's statements were clearly designed to chill employees from continuing in the protected

[11] A trial, there was also testimony that White could not recall how to open the office safe for a two-hour period when she was working alone during her first week in the Flint office. The record shows that during that period no need for opening the safe arose. This incident is not raised in the Respondent's brief as a basis for the discharge and I do not believe it could reasonably be offered as such.

activity by raising the specter that the Respondent would discharge them for doing so. I find that these statements reasonably tended to restrain the employees in the exercise of their statutory right to engage in protected concerted activities and constituted a threat in violation of Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by discriminatorily discharging Susan M. White because she engaged in protected concerted activity.

3. The Respondent violated Section 8(a)(1) of the Act by threatening that employees would be discharged for engaging in protected concerted activities.

Remedy

In addition to the usual cease-and-desist order and other affirmative action, I will recommend that the Respondent be ordered to offer Susan M. White full and immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, and to make her whole for any loss of earnings or benefits resulting from the discrimination against her. The backpay is to be computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[12]

ORDER

The Respondent, Superior Travel Service, Inc., Flint, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

(b) Threatening that any employee will be discharged or otherwise punished for engaging in protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Susan M. White full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Susan M. White whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Flint, Michigan, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 21, 2004

Paul Bogas
Administrative Law Judge

[13] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activity.

WE WILL NOT threaten that you will be discharged or otherwise punished for engaging in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Susan M. White full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Susan M. White whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Susan M. White, and WE WILL, within 3 days thereafter,

notify her in writing that this has been done and that the discharge will not be used against her in any way.

SUPERIOR TRAVEL SERVICE, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.